No. 01-1472

In The
Supreme Court of the United States
October Term, 2001

FLORIDA DEPARTMENT OF INSURANCE
Petitioner

v.

CHASE BANK OF TEXAS NATIONAL ASSOCIATION
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

State of California *Amicus Curiae* Brief in Support of Petition for Writ of Certiorari of Florida Department of Insurance

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QUESTION PRESENTED

Whether under proper principles of federalism the question of the standing of the Florida Department of Insurance under the receivership laws of Florida should have been certified to the Supreme Court of Florida as authorized by the Florida Constitution, Statutes, and Rules of Court.

AMICUS CURIAE LIST OF PARTIES

Petitioner. Florida Department of Insurance, Domiciliary Receiver of Western Star Insurance Company, Ltd., an Antigua corporation.

Amicus Curiae. The California Department of Insurance is Ancillary Receiver of Western Star. The State of California filed an *Amicus* Brief in support of Florida's appeal to the Fifth Circuit and an *Amicus* Brief in support of Florida's Request for Certification and Rehearing.

Respondent. Chase Bank of Texas National Association, f/k/a Texas Commerce Bank National Association, f/k/a Ameritrust of the Texas National Association.

Chase is wholly owned by J. P. Morgan & Chase Co., which is publicly traded on the New York Stock Exchange.

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I. INTEREST OF *AMICUS CURIAE*

The State of California by and through the California Attorney General files this *amicus curiae* brief in support of the petition in accordance with Supreme Court Rule 37.4.

The California Commissioner of Insurance is the ancillary receiver of Western Star Insurance Company and has previously filed an *amicus curiae* brief in support of the Florida Department of Insurance, the domiciliary receiver of Western Star. California concurs in and supports Florida's petition for writ of certiorari for the reasons set forth herein and in Florida's moving papers.[1]

Under California Insurance law, the Commissioner of Insurance, as receiver or liquidator of an insolvent insurance company, acts not only to preserve the assets of the insolvent company but also to represent and protect policyholders and third parties from injury caused by the insolvency. These insurance insolvency laws place special emphasis upon protecting the rights of policyholders and expanding the power of state insurance receivers to pursue actions against third parties for the benefit of those policyholders. Thus, it is of vital importance to California and other states to preserve their regulatory ability to pursue claims on behalf of policyholders.

As the ancillary receiver of Western Star, the State of California has a direct interest in the certification to the Florida Supreme Court of the Florida Department of Insurance's standing.

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[1] California is informed that the National Association of Insurance Commissioners (NAIC) endorses the statements and reasons in this *amicus brief*. The NAIC is an organization of the principal or chief insurance officers of all fifty states, the District of Columbia, the territories and insular possessions of the United States. Started in 1871, it is the nation's oldest association of state government officials. The Fifth Circuit's rejection of a state department of insurance's standing and refusal to certify the question to the supreme court of that state is contrary to good principles of federalism. The Fifth Circuit's rejection of the structure of state receivership law for the administration of insolvent insurance companies in favor of the federal bankruptcy, FDIC or other model infringes upon the rights of all states and violates basic principles of federalism.

The purpose of the insurance insolvency laws of California is to protect the interests of policyholders and third party claimants. Over 18,000 Western Star policies, representing $6.8 million in premiums, were sold in California by licensed surplus lines brokers following confirmation of the existence of a Trust by the former trustee, Ameritrust (now Chase). The trust, which was certified by Ameritrust as having a market value of $5.4 million, was required by California regulations in order for surplus lines brokers to sell Western Star policies in California. The purpose of the trust requirement is to protect the claims of policyholders and third party claimants in the event of the insurer's insolvency by allowing the trust funds to be used by the court-appointed receiver to pay such claims.

If Florida's request for certification of standing is denied, it cannot fulfill its receivership duties and responsibilities to California policyholders in conjunction with California's ancillary administration.

II. SUMMARY OF ARGUMENT

Insurance regulation is an area of the law which both Congress and this Court have recognized as being expressly reserved to the states. It is of vital interest to California to have the question of Florida's standing determined by certification to the Florida Supreme Court.

III. ARGUMENT

RESOLUTION OF THE QUESTION PRESENTED IS NECESSARY TO PROPERLY REFLECT CONGRESS' AND THIS COURT'S DEFERENCE TO THE STATES' INSURANCE REGULATION POWERS

The federalism issues raised by the Question Presented are of substantial public importance to California, Florida and Texas, as well as all other states that have enacted insurance legislation patterned after the Uniform Insurers Liquidation Act. The refusal of the United States Court of Appeals to defer state insurance

regulation issues to the state supreme court violates important principles of federalism as well as the intent of Congress and the Supreme Court.

In passing the McCarran-Ferguson Act (15 U.S.C. 1011-1015) Congress mandated that the regulation of the business of insurance, which Congress believed to be a local matter, be left to the individual states. *See Western & Southern Life Insurance Co. v. Bd. of Equalization*, 451 U.S. 648, 652-655 (1981). The act "reverse preempts" federal law in cases where a federal statute conflicts with the state regulation of insurance. *Department of Treasury v. Fabe*, 508 U.S. 491 (1993).

In addition, the federal courts have long deferred to state courts regarding the administration of the estates of insolvent banks and insurers. Such deference arises within the context of the state's overriding interest in regulating, conserving and liquidating insolvent insurance companies. In *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), the Supreme Court held that federal courts should not interfere with specialized ongoing state regulatory schemes. *Burford* abstention has been applied to state regulation of insurance where such regulation involved matters of substantial state concern and where state policies were carried out in a statutorily established regulatory program by state officials. *Levy v. Lewis*, 635 F.2d 960, 963 (2nd Cir. 1980).

Certification of an important question of state law to a state supreme court is a modern application of the "Pullman" abstention doctrine established by this Court in *Railroad Comm'n of Tex. V. Pullman Co.*, 312 U.S. 496 (1941). The certification procedure sought by Florida in the instant petition allows a federal court faced with a state law question to put the question directly to the State's highest court, reducing delay, cutting costs and increasing the assurance of gaining an authoritative response. Such a procedure also helps build a cooperative judicial federalism. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997).

Certification is particularly needed in a case dealing with an area of the law, such as insurance regulation, which both

Congress and this Court have recognized as being specially reserved to the states.

Florida's insurance insolvency statutes clearly state as their purpose the protection of the interests of insureds, creditors, and the public generally. *Florida Statutes §631.001(4).* Thus, the question of whether the Florida Department of Insurance, as receiver of Western Star, can pursue claims of policyholders under Florida law should have been deferred to the Florida Supreme Court.

Pursuant to the abstention doctrines discussed above, the question of standing of state departments of insurance to represent interests of policyholders and third party claimants should be decided under state law. This Court can protect proper principles of federalism by granting certiorari and certifying the standing questions to the Florida Supreme Court.

CONCLUSION

Based on the foregoing, California respectfully requests that Florida's petition for writ of certiorari should be granted.

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